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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1024

AMERICAN CONTINENTAL HOMES, INC. and AMERICAN FINANCIAL CORPORATION,

Petitioners,

vs.

KFK CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS FOR THE SECOND DISTRICT

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OPINIONS BELOW

The opinion of the Appellate Court of Illinois for the Second District is reported at 71 Ill.App.3d 304, 389 N.E.2d 232 (1979) and is set out in Appendix A to this Petition. The order of the Illinois Supreme Court denying Petitioners' petition for leave to appeal is reprinted in Appendix B. The trial court judgment order of the Circuit Court for the 18th Judicial Circuit, DuPage County, Illinois is unreported but is set forth in full in the Illinois Appellate Court opinion. App. A, pp. 2a-3a.

JURISDICTION

The judgment of the Appellate Court of Illinois for the Second District was entered on April 30, 1979. Petitioners' petition for leave to appeal to the Supreme Court of Illinois was denied by the Illinois Supreme Court on October 1, 1979. The jurisdiction of the Court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Did the Illinois courts incorrectly interpret the Securities Act of 1933 (15 U.S.C. § 77a *et seq.*) by refusing to recognize that stock may be resold in a private placement without registration by one who initially received the unregistered stock from the issuer?

2. Did the Illinois courts incorrectly interpret Rule 144 of the Securities and Exchange Commission by concluding that an individual who sells stock pursuant to Rule 144 may be an "underwriter"?

STATUTES AND RULES INVOLVED

The Securities Act of 1933, Sections 4(1) and (2) (15 U.S.C. § 77d(1) and (2)) provides as follows:

> "§ 77d. Exempted transactions
>
> The provisions of section 77e of this title shall not apply to—
>
> (1) transactions by any person other than an issuer, underwriter, or dealer.
>
> (2) transactions by an issuer not involving any public offering."

Rule 144 of the Securities and Exchange Commission, 17 C.FR. § 230.144 is duplicated in Appendix C.

STATEMENT OF THE CASE

The federal question presented herein is whether it is permissible and reasonable for a party to resell securities initially issued in a private placement without registration either (1) privately or (2) through the use of Rule 144 of the Securities and Exchange Commission. This question first arose in the trial court pleadings in the context of the dispute relating to the proper exercise of an option agreement. Exhibits cited herein also show the importance of this federal question throughout the litigation.

Plaintiff-respondent KFK filed suit for specific performance of an option contract, seeking to require petitioner-defendant ACH to pay KFK $850,000.00 in exchange for 46,380 shares of ACH stock held by KFK.

Petitioner-defendant AFC was a guarantor of ACH's contractual obligations. Both ACH and AFC denied that KFK had properly exercised its option to require ACH to purchase stock from KFK on the ground that KFK had not utilized "all reasonable efforts" to first dispose of the stock itself, which "reasonable efforts" were required as a condition precedent to ACH's repurchase obligation.

In 1971, KFK began work on the development of a large tract of single family homes and condominium units. (Tr. 41) In June, 1972, ACH purchased the development, which was still under construction, from KFK. The contract which the parties negotiated and agreed upon provided for the sale of the KFK development to ACH in return for, among other things, payment to KFK of 46,380 shares of unregistered ACH stock.

As set forth in full in the Illinois Appellate Court opinion, the contract provided KFK with various options for liquidating the 46,380 shares of ACH stock in the event the shares were not subsequently registered under the terms of the Securities Act of 1933. The relevant clause of the contract provided as follows:

> "3.(f)(iv) In the event that KFK fails to exercise the right given to it under the provisions of the immediately preceding paragraph 3(f), then KFK shall have the right after July 5, 1974, and prior to July 15, 1974, to elect either (aa) to retain its ACH shares owned by it on July 15, 1974, or *(bb) to dispose of said shares; and in the latter event, KFK shall undertake, utilizing all reasonable efforts, to dispose of so many of the ACH common shares as may be sold by it in conformity with the provisions of the Securities Act of 1933 and for the market price of such shares then prevailing, and if all said shares are not disposed of, then within ten (10) days after September 5, 1974, ACH or American Financial Corporation as guarantor agree that it shall purchase, if offered to it by KFK, the ACH stock which KFK has theretofore been unable to dispose of in accordance with this paragraph for the purchase price which shall be the difference between the net proceeds of the ACH stock which KFK has theretofore disposed of, either during said period after July 5, 1974, or prior thereto, and Eight Hundred Fifty Thousand Dollars ($850.000.00).* KFK shall notify ACH in writing prior to July 16, 1974 of its choice as to the options available to it during the period of July 5, 1974, and July 15, 1974." (Plaintiff's Exhibit 6) (Emphasis added).

Thus, the contract afforded KFK the option to dispose of the stock by "utilizing all reasonable efforts" and, failing to sell all the stock, to require ACH to buy any shares which KFK had been unable to sell for the difference between the amount received for the shares sold and $850,000.00.

At the time of the contract, KFK also sent ACH an "investment letter" which explicitly set forth the methods by which KFK could dispose of its ACH stock:

> "[KFK Corporation], in purchasing 46,380 shares of your Common Stock, understands that said shares have not been registered under the Securities Act of 1933 by reason of a specific exemption under that Act which is dependent in part upon its intention in acquiring said stock.
>
> * * *
>
> "Furthermore, this corporation agrees not to sell, transfer, or otherwise dispose of any of the shares referred to above unless:
>
> A. Said shares have first been registered under the Securities Act of 1933; or
>
> B. *The sale may be accomplished pursuant to the provisions of Rule 144 as adopted under*

the Securities Act of 1933 or rules of similar import without such registration; or

C. *In the opinion of your counsel, registration of the shares is not required under the circumstances of particular transaction proposed."*

(Defendant's Exhibit 4) (Emphasis added).

Thus, KFK agreed to dispose of the unregistered stock either according to Rule 144 of the Securities and Exchange Commission or in a transaction in which registration of the shares was not required, in the opinion of counsel.

The ACH stock held by KFK was never registered. (Pl. Ex. 27) KFK attempted to exercise option 3(f)(iv)(bb) of the contract (as set forth above). KFK claimed that it had made all reasonable efforts to dispose of the ACH stock, had been unable to sell even one share, and demanded payment of $850,000.00. (Pl. Ex. 33) ACH and AFC denied that KFK had made all reasonable efforts to sell the stock and refused to repurchase the stock. (C-147)

It is undisputed that KFK's "all reasonable efforts" did not include either exploring the possibility of a private placement of the ACH stock or exploring the possibility of utilizing Rule 144 of the Securities and Exchange Commission. (Tr. 93-94, 115)

In effect concluding that neither a private placement of the unregistered stock nor the utilization of Rule 144 were permissible under the Securities Act of 1933, the Illinois Courts found that KFK's attempts to dispose of its stock had been reasonable and that KFK had properly exercised its option to require ACH to repurchase the stock.

REASON FOR GRANTING THE WRIT

THE ILLINOIS APPELLATE COURT ERRONEOUSLY INTERPRETED FEDERAL SECURITIES LAWS IN DECIDING THAT KFK HAD UTILIZED ALL REASONABLE EFFORTS TO DISPOSE OF ITS STOCK.

The reason why this Court should grant the petition for a writ of certiorari is that the Illinois courts have refused to recognize the right of a person to privately resell unregistered securities which had been issued in a private placement. Indeed, the Illinois courts have effectively concluded that securities initially issued in a private placement without registration cannot be disposed of except upon registration. This petition for a writ of certiorari thus presents this Court with an opportunity to rule on, for the first time, the permissibility of so-called "Section 4(1½) transactions" under the Securities Act of 1933 (15 U.S.C. § 77d), which section permits private resales of unregistered securities, as well as Rule 144 sales.

Under the contract terms, before ACH could be required to repurchase the 46,380 shares under paragraph 3(f)(iv)(bb), KFK had to first utilize "all reasonable efforts" to dispose of its unregistered ACH stock. To determine what constituted "all reasonable efforts" under the circumstances, an understanding of KFK's alternatives under the securities laws is the logical starting point. The Illinois Appellate Court, admitting that "an analysis of [the rules and regulations of the Securities and Exchange Commission] is clearly beyond the competency of this Court", nevertheless attempted to analyze the circumstances under which unregistered stock could be lawfully sold. The Illinois Appellate Court's analysis was clearly erroneous.

Section 4 of the Securities Act of 1933 provides in relevant part:

> "The provisions of Section 77e [Registration Requirement] of this title shall not apply to:
>
> (1) transactions by any person other than an issuer, underwriter or dealer.
>
> (2) transactions by an issuer not involving any public offering." 15 U.S.C. § 77d.

Combining the features of both §§ 4(1) and 4(2), the Courts and the SEC have recognized the right of a person to privately resell securities initially issued in a private placement without registration. This type of resale is known (among securities lawyers) as a "Section 4(1½) transaction." *See* A Report to the Committee on Federal Regulation of Securities from the [ABA] Study Group on Section "4(1½)" of the Subcommittee on the 1933 Act, 34 *The Business Lawyer* 1961 (July 1979).

The Illinois Appellate Court ignored this common method available for disposing of KFK's unregistered stock. The Illinois Appellate Court made the completely erroneous statement that "unregistered stock, on the other hand, may be disposed of *only* through a broker (who may not solicit potential purchasers) and *only* then if the sale meets very strict requirements." (Emphasis added) Clearly, the Illinois Appellate Court refused to recognize the availability of the Section 4(1½) private placement alternative for disposing of the unregistered stock.

The Appellate Court also committed error by holding, in effect, that KFK might have been liable as an underwriter if it had tried to sell its stock in compliance with Rule 144 of the Securities and Exchange Commission (17 C.F.R. § 230.144). Clearly, a seller of unregistered stock in accordance with Rule 144 has never

been thought, up to now, to be liable as an underwriter. Rule 144 "permits the public sale in ordinary trading transactions of limited amounts of securities owned by persons . . . who have acquired restricted securities of the issuer." 1 Fed.Sec.L.Rptr. (CCH) ¶2705A. While the record clearly demonstrates that KFK made no attempt to sell even one share of ACH stock in accordance with Rule 144, the Appellate Court still found that KFK had "utilized all reasonable efforts" to dispose of its stock based on the following reasoning:

> ". . . the seller may become an 'underwriter' and thus become a guarantor of the value of the stock and be exposed to both federal criminal liability and civil suit by the purchaser of this stock. See, §§ 2(11), 4, 5, and 12, Securities Act of 1933, 15 U.S.C. §§ 77A-77AA and Rule 144 thereunder, 17 C.F.R. 230.144). While our interpretation of the federal securities rules may be oversimplified, it is absolutely incontrovertible that one seeking to dispose of unregistered stock is in a much more difficult and vulnerable position than one seeking to dispose of registered stock. In the light of that substantial difference, we hold that reasonable effort referred to in paragraph 3(f)(iv)(bb) cannot in good faith require that KFK become an 'underwriter' and expose itself to such extensive potential liability without an express agreement to that effect included in the contract. Bearing in mind these facts and circumstances, and construing subparagraph (3)(f)(iv)(bb) most strictly against its authors, we find that the facts support a finding that KFK utilized 'all reasonable efforts' to dispose of its ACH stock and thus fulfilled that condition precedent." App. A, pp. 8a-9a.

The Illinois Appellate Court thus apparently believed that a sale in accordance with Rule 144 would make KFK an underwriter. In fact, the exact opposite is true, i.e., a sale of unregistered stock in conformity with Rule

144 assures the seller he will *not* become an underwriter. Further, the Appellate Court implicitly held that "all reasonable efforts" to dispose of unregistered stock did not have to include even an *inquiry* into the possibility of a sale of stock in accordance with Rule 144. If an attempt to comply with a published regulation of the Securities and Exchange Commission is not the touchstone of reasonableness, it is difficult to comprehend what would be. The Illinois Appellate Court's misconstruction of Rule 144's effect should be corrected.

CONCLUSION

The Illinois Appellate Court refused to recognize the private placement alternative, the so-called Section 4(1½) transaction, available to KFK to dispose of its unregistered stock. This Court is thus presented with the opportunity to clarify the availability of this widely used exemption from registration.

Furthermore, the Illinois Appellate Court concluded that reasonable efforts to dispose of securities do not include compliance with Rule 144 and that one who does comply may even be an "underwriter." This incorrect analysis of Rule 144 should not be permitted to stand.

Petitioners-defendants ACH and AFC respectfully pray that the petition for certiorari be granted.

Respectfully submitted,

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APPENDIX A

(Filed April 30, 1979)

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

KFK Corporation,

Plaintiff-Appellee and Cross-Appellants,

No. 77-339 *v.*

American Continental Homes, Inc. and
American Financial Corporation,

Defendants-Appellants and Cross-Appellees.

Appeal from the 18th Judicial Circuit,
DuPage County, Illinois.

Mr. Presiding Justice Guild delivered the opinion of the court:

This appeal arises from the sale of a partially completed real estate development located in Wheaton, Illinois. The contract of sale was executed on June 8, 1972 and the sale was closed on July 5, 1972. The development consisted on an area of single family homes known as Casa Solana and an area of multiple family condominiums known as Heritage Lake Estates. The seller was KFK, an Illinois corporation which was in the business of develop-

ing residential realty in the DuPage county area. The purchaser was American Continental Homes, a Delaware corporation (hereinafter ACH) which was seeking to enter the residential housing market in northern Illinois during 1972. Also involved in the transaction, but solely as a guarantor for the contractual obligations of ACH, was its corporate parent, American Financial Corporation, also a Delaware corporation (hereinafter AFC).

This litigation began on September 16, 1974 when KFK filed a complaint for specific performance against both ACH and AFC. That complaint alleged that under the provisions of section 3(f)(iv) of the contract of sale the two defendants should be ordered to purchase 46,380 shares of unregistered ACH common stock from KFK for the fixed price of $850,000. The two corporate defendants were represented by the same counsel and, in a joint answer, denied that they had any duty to purchase stock from KFK. In addition, ACH counterclaimed for damages arising from an alleged breach of contractual guarantees by KFK. AFC filed its own counterclaim for $500,000 in overdue principal on a promissory note, executed by KFK and subsequently held in due course by AFC.[1]

After an extensive bench trial on the conflicting claims of the parties, the trial court entered an order on April 14, 1977 which found as follows:

> "A. That the material issues relative to the Complaint for Specific Performance are with the plaintiff, K.F.K. CORPORATION, and against the defendants, AMERICAN CONTINENTAL HOMES, INC. and AMERICAN FINANCIAL CORPORATION.

---

[1] In *KFK Corporation* v. *American Continental Homes, Inc.* (1975) 31 Ill.App.3d 1017, 335 N.E.2d 156, this court affirmed a preliminary injunction which restrained the defendants from taking any action affecting the status of the 46,380 shares of ACH stock involved in this action since that stock was collateral for the $500,000 note held by AFC. The issues raised in that opinion have been disposed of and have not been renewed.

> B. That the material issues relative to the Counterclaim filed by the defendants, AMERICAN CONTINENTAL HOMES, INC. and AMERICAN FINANCIAL CORPORATION, are with the plaintiff, K.F.K. CORPORATION, and against the said defendants.
>
> IT IS HEREBY ORDERED, ADJUDGED AND DECREED by the Court that a judgment be and the same is hereby entered in favor of the plaintiff, K.F.K. CORPORATION, and against the defendants, AMERICAN CONTINENTAL HOMES, INC. and AMERICAN FINANCIAL CORPORATION, and each of them, jointly and severally, in the amount of THREE HUNDRED FIFTY THOUSAND DOLLARS ($350,000.00), together with plaintiff's costs of suit.
>
> IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Counterclaim filed by the defendants, AMERICAN CONTINENTAL HOMES, INC. and AMERICAN FINANCIAL CORPORATION, and against the plaintiff, K.F.K. CORPORATION, be and the same is hereby dismissed with prejudice."

All three corporations which are parties to this litigation have appealed. ACH and AFC, represented by the same counsel, filed a joint notice of appeal as well as joint appellants' briefs. In those briefs they contend first that KFK was not entitled to specific performance because it had allegedly failed to perform various conditions precedent and, second, that ACH was entitled to damages arising out of alleged breaches of warranty by KFK. In its cross-appeal KFK contends that it should have received statutory pre-judgment interest on the purchase price of the stock from the date the stock should have been purchased to the date of judgment.

We have carefully examined both the arguments of the parties and the record herein. As a result of that examination we conclude that this opinion must be divided into two broad areas of examination. The first is whether the findings of the trial court are beyond the manifest

weight of the evidence. The second is whether the relief ordered by the trial court properly reflected the rights, duties and liabilities of the three separate parties as established by the court's findings of fact.

We now turn to the first broad area of examination where we initially examine KFK's claim for the specific performance of a provision contained in the realty sales contract. It is the provisions of that contract which both create and define the scope of relief available to KFK, if any. The specific contractual provisions which are necessary to a proper determination of this point are as follows:

"(f) ACH agrees and American Financial Corporation hereby becomes a party to this Contract for the sole purpose of guaranteeing the commitment of ACH contained in this sub-paragraph 3 (f).

(i) If prior to December 31, 1973, ACH has made available to KFK the Registration opportunity set forth in the immediately preceding sub-paragraph and the Registration Statement made available to KFK has become effective prior to said December 31, 1973, and in the further event that the market value of an ACH Common share as of December 31, 1973 (computed in the same manner as sub-paragraph 3(e)) when multiplied by the number of shares of ACH Common Stock issued to KFK under the terms of sub-paragraph 3(e) is less than Eight Hundred Twenty-Five Thousand Dollars ($825,000), then within Ten (10) days after December 31, 1973, ACH or American Financial Corporation as guarantor shall pay to KFK the difference between Eight Hundred Twenty-Five Thousand Dollars ($825,000) and the number of shares of ACH stock issued pursuant to sub-paragraph 3(e) multiplied by the market value of ACH stock on December 31, 1973, as computed in sub-paragraph 3(e); and ACH and American Financial Corporation as guarantor shall have no further obligation to KFK with respect to the ACH shares issued under this Agreement.

(ii) If prior to December 31, 1973, ACH has made available to KFK the Registration opportunity set forth in the immediately preceding sub-paragraph and the Registration Statement made available to KFK has become effective prior to said December 31, 1973, and in the further event that the market value of ACH Common Stock on December 31, 1973, (as hereinabove computed) when multiplied by the number of shares of ACH Common Stock issued pursuant to sub-paragraph 3(e) is in excess of Eight Hundred Twenty-Five Thousand Dollars ($825,000), then ACH and American Financial Corporation as guarantor shall have no further obligations to KFK with respect to the ACH Stock issued hereunder.

(iii) If on December 31, 1973, the Registration hereinabove referred to in this sub-paragraph 3(f) has not been made available to KFK, or has not become effective, then KFK shall have the right to require ACH or American Financial Corporation as guarantor to pay to KFK the difference between the number of ACH Common shares issued to KFK under the terms of sub-paragraph 3(e) multiplied by the market value of ACH Stock on December 31, 1973 (as hereinabove computed) and the sum of Eight Hundred Twenty-Five Thousand Dollars ($825,000) within Ten (10) days after December 31, 1973; and upon the payment of said amount, ACH and American Financial Corporation as guarantor shall have no further obligation to KFK with respect to the ACH shares issued hereunder.

(iv) In the event that KFK fails to exercise the right given to it under the provisions of the immediately preceding paragraph 3(f), then KFK shall have the right after July 5, 1974, and prior to July 15, 1974, to elect either (aa) to retain its ACH shares owned by it on July 5, 1974, or (bb) to dispose of said shares; and in the latter event, KFK shall undertake, utilizing all reasonable efforts, to dispose of so many of the ACH Common shares as may be

sold by it in conformity with the provisions of the Securities Act of 1933 and for the market price of such shares then prevailing, and if all of said shares are not so disposed of, then within Ten (10) days after September 5, 1974, ACH or American Financial Corporation as guarantor agrees that it shall purchase, if offered to it by KFK, the ACH stock which KFK has theretofore been unable to dispose of in accordance with this paragraph for the purchase price which shall be the difference between the net proceeds of the ACH stock which KFK has theretofore disposed of, either during said period after July 5, 1974, or prior thereto, and Eight Hundred Fifty Thousand Dollars ($850,000). KFK shall notify ACH in writing prior to July 16, 1974, of its choice as to the options available to it during the period of July 5, 1974, and July 15, 1974."

These provisions by themselves, however, are meaningless without an understanding of the actions of the parties herein. An examination of the record reveals these pertinent facts: 1. The contract of sale was drafted by legal counsel for the defendant ACH and KFK had no imput into the wording of the provisions set forth above. 2. The 46,380 shares of ACH stock were never registered by ACH with the Securities and Exchange Commission, although the parties clearly anticipated such registration at the time of contract. 3. KFK never exercised its right to recover the stock's value guaranteed under sub-paragraph 3(f)(iii). 4. In a letter dated July 5, 1974 KFK clearly notified both ACH, and AFC as guarantor, that it intended to dispose of its ACH stock under the provisions of sub-paragraph 3(f)(iv)(bb) of the contract. 5. Legal counsel for KFK requested in writing on at least two occasions during July, 1974 that ACH disclose the registration status of the stock so that KFK might properly proceed in disposing of it pursuant to the contract. Both of these requests were ignored by ACH. 6. The actual stock certificate concerned herein bore a legend reciting that the stock had been acquired by KFK solely as an in-

vestment, thus becoming "lettered" or "legend" stock. 7. The testimony of a stock broker, Mr. Hudson Worth, revealed that such lettered stock could only be disposed of by a broker and that his own brokerage firm would not handle such a sale unless the legend were removed by the issuing corporation, that is to say, ACH. It was also revealed that KFK contacted Mr. Worth, the stock broker, during the summer of 1974 and that he informed them that there was essentially no market for the unregistered ACH stock. 8. Neither ACH nor AFC made any attempt whatsoever to aid KFK in disposing of the stock, either by removing the legend or suggesting a purchaser. In fact there is evidence that ACH did not wish the stock sold on the open market since the sale of such a large block would depress the value of the ACH stock. 9. KFK failed to sell any of its ACH stock prior to September 5, 1974. 10. In a letter dated September 4, 1974 and sent to both ACH and AFC, KFK tendered the 46,380 shares of ACH stock which it had acquired under the sales agreement. That same letter also contained a demand for the full purchase price of $850,000 called for by the contract since none of the shares had been sold previously.

Based on the strict wording of the contract, the facts in the record and the arguments of the parties, it is clear that the sole issue controlling the claim for specific performance is whether KFK adequately performed all the conditions precedent required of it. After a careful review and analysis, we are of the opinion that it has. The threshhold condition of sub-paragraph 3(f)(iv), namely that KFK had not exercised the proceeding options open to it under paragraph 3(f), was clearly met. Sub-paragraphs 3(f)(i) and 3(f)(ii) were unavailable to KFK since the stock was never registered; and KFK never elected recovery of guaranteed value from either ACH or AFC under the provisions of paragraph 3(f)(iii). KFK's letter of July 5, 1974 establishes that KFK did not elect to retain its ACH shares under sub-paragraph 3(f)(iv)(aa) but chose the option of disposal available to it under sub-paragraph 3(f)(iv)(bb). And, as the last sen-

tence of paragraph 3(f)(iv) requires, KFK notified ACH in writing, prior to July 16, 1974, of its election. Next, we face the question of whether KFK utilized all "reasonable efforts" to dispose of some or all of its ACH stock. As the briefs and arguments of the parties contend, it is the interpretation of the term "reasonable efforts" which controls. Due to the clearly divergent positions of the parties, and supported by our own reading of the contract, we are forced to conclude that this provision is ambiguous. The law of this State requires its courts, in any interpretation of contractual ambiguity, to attempt to give a reasonable effect to all of the contract's parts and, if necessary, resolve any ambiguity most strongly against its author. (*See, Bost* v. *Paulson's Enterprises, Inc.* (1976) 36 Ill.App.3d 135, 343 N.E.2d 168; *Heifner* v. *Board of Education* (1975), 32 Ill.App.3d 83, 335 N.E.2d 600.) Relying on these principles, we observe that in all the sub-paragraphs of paragraph 3(f) except sub-paragraph 3(f)(iv), reference is made to whether the ACH stock has been registered with the Securities and Exchange Commission. Since the registration status of the stock made some difference to KFK's options of disposition, we have examined, and take judicial notice of, the rules and regulations of the Securities and Exchange Commission concerning registered and unregistered stock. An analysis of those rules is clearly beyond the competency of this court and we will make no attempt to either interpret or summarize them. However, our examination reveals to us that registered stock may generally be sold or disposed of through a broker who solicits purchasers on the open market without exposing the seller to either difficulty or liability. Unregistered stock, on the other hand, may be disposed of only through a broker (who may not solicit potential purchasers) and only then if the sale meets certain very strict requirements. In addition, the seller may become an "underwriter" and thus become a guarantor of the value of the stock and be exposed to both federal criminal liability and a civil suit by the purchaser of the stock. (*See,* §§2(11), 4, 5 and 12, Securities Act of 1933,

15 U.S.C. §§77A-77AA and Rule 144 thereunder, 17 C.F.R. 230.144. While our interpretation of the federal securities rules may be oversimplified, it is absolutely incontrovertible that one seeking to dispose of unregistered stock is in a much more difficult and vulnerable position than one seeking to dispose of registered stock. In the light of that substantial difference, we hold that "reasonable effort" referred to in paragraph 3(f)(iv)(bb) cannot in good faith require that KFK become an "underwriter" and expose itself to such extensive potential liability without an express agreement to that effect included in the contract. Bearing in mind these facts and circumstances, and construing sub-paragraph 3(f)(iv)(bb) most strictly against its authors, we find that the facts support a finding that KFK utilized "all reasonable efforts" to dispose of its ACH stock and thus fulfilled that condition precedent.

We note next that in the letter dated September 4, 1974, and signed by KFK's president, a paragraph was included which purported to tender the stock involved here to the defendants under the provisions of the contract. We note in this regard that the contract is silent insofar as the specific requirements for the tender of the stock is concerned. In the light of this silence we hold that the action of KFK in making the tender by letter without the physical presence of the stock was more than adequate to trigger the contractual obligations of ACH and/or AFC, as guarantor. Finally, since KFK still possessed its stock as of September 5, 1974 and there had been no partial sale of the ACH stock held by KFK, then ACH was bound to purchase that stock for the stated price of $850,000. We note at this point, however, that AFC was only a guarantor for ACH's obligation and would only become liable under this contract if it could be shown that ACH could not perform.

Based on the foregoing analysis, we hold that the trial court correctly found the merits of KFK's counterclaim to lie with the plaintiff and therefore an order of specific performance should properly have been entered. We will

deal with the specific wording of that order at a later point in this opinion.

We now turn to the merits of ACH's counterclaim against KFK for the breach of alleged guarantees made by KFK regarding the anticipated costs of completing the housing developments purchased by ACH. The contractual provisions upon which ACH relies are as follows:

> "(c) KFK represents to ACH that it has entered into a contract or contracts for land development of Lot No. 103, including but not necessarily limited to streets, mass grading, sewer, curbing, and that such contract provides for the completion of land development, exclusive of landscaping, trees, final grading, clubhouse, swimming pool, and the erection of the residence units in the Development for a cost of Five Hundred Twenty-Eight Thousand Dollars ($528,000), and KFK represents that such land development can be completed according to plans within the cost figure of Five Hundred Twenty-Eight Thousand Dollars, ($528,000); provided, however, that such representation as to completion costs is subject to contract provisions relative to price deviations arising out of conditions other than those set forth in the specifications.
>
> (d) Attached hereto as Exhibit "E" are KFK's cost sheets for its single-family and multi-family dwelling units. KFK represents to ACH that such cost sheets fairly represent its costs in erecting the respective dwelling units on May 31, 1972, and subject to minor adjustments and to labor and material increases occurring thereafter, the respective dwelling units can be constructed to completion within the costs set forth on the cost sheets if built according to standard specifications."

We are of the opinion that a detailed recitation of the facts relating to this claim is unnecessary. It suffices to say that ACH contends that the preceding contractual provisions created a warranty flowing from KFK to ACH that the contemplated developments to the realty, both

condominium and single family, could be completed with the cost estimates of KFK. We have examined the contract and the evidence introduced by the parties and we conclude that no such warranty, either express or implied, existed. At the very most it could be said that certain representations were memorialized in the contract but it is quite clear that KFK afforded ACH and its employees every opportunity to verify the accuracy of these representations prior to the closing of the sale. In fact, KFK specifically allowed the representatives of ACH to examine any and all documents concerning the realty involved in the sale, including all price sheets, books and estimates. Furthermore, the record reveals that most or all of the cost overruns encountered by ACH arose from the existence of certain poor soil conditions in the subject realty. The record shows that, but for those soil conditions requiring special means of construction, these overruns probably would not have occurred. We note that nowhere in the contract did KFK ever specifically warranty the subsurface conditions at the construction site. In fact, KFK allowed ACH free access to the site to test the soil while the contract negotiations were still going on. Regardless of the results of those tests, which apparently indicated problems, ACH elected to draft the contract without including a warranty of soil conditions. At best, the existence of a warranty by KFK is ambiguous. Accordingly, we hold that the finding of the trial court denying the merits of ACH's counterclaim was correct and should be affirmed.

We turn now to the issue of whether the trial court erred in finding for KFK with regard to AFC's counterclaim for judgment on the $500,000 note executed by KFK and purchased by AFC from the Union Commerce Bank of Cleveland, Ohio, which had held the note prior to September, 1974. The issue is simply whether AFC is entitled to judgment on that note. The record reveals that AFC introduced the note into evidence and it is undisputed by the parties that although KFK paid all interest due on this note until September, 1974, it had failed to

pay the $500,000 in principal. In fact, the witnesses for KFK all indicate that KFK acknowledged the existence of the debt and had directed that $500,000 of the proceeds of the sale of the ACH stock be directed to the payment of this debt. Therefore, we must conclude that the trial court's finding for KFK upon the merits of AFC's counterclaim, which was based solely on the note, is beyond the manifest weight of the evidence and must be reversed.

We now turn to the second broad area of examination set forth above, i.e., whether the trial court's order properly reflected the rights, duties and liabilities of the parties. In this area we must first consider the cross-appeal of KFK which contends that it was entitled to prejudgment interest upon the purchase price for the stock, pursuant to the provisions of Ill.Rev.Stat. 1975, chapter 74, section 2, which reads in pertinent part as follows:

> "Creditors shall be allowed to receive at the rate of five (5) per centum per annum for all moneys after they become due on any bond, bill, promissory note, or other instrument of writing; . . ."

In its brief and at oral argument, KFK contended that a debtor-creditor relationship as to a fixed or readily determinable sum, was created by the June 8, 1972 contract, which was an instrument in writing. ACH and AFC have countered with the contention that the existence of a "good faith dispute" between the parties as to both the existence and the amount of the alleged debt makes such pre-judgment interest inappropriate. The issue thus presented is whether the absence of a good faith dispute between the litigants is a necessary element to the award of pre-judgment interest to a creditor who is due a fixed or readily determinable sum arising from a note or other instrument in writing. This particular issue has arisen and has been dealt with by this court in the case of *Haas* v. *Cravatta* (1979), ... Ill.App.3d ....., ... N.E.2d ....., filed contemporaneously with this opinion. In *Haas* we analyze the divergence of opinions between the courts of the various districts regarding the impact of good faith disputes on

statutory interest. We held there that the existence of a good faith dispute only affects that portion of chapter 74, section 2 which relates to "unreasonable or vexatious delay" and that it has no applicability to cases involving instruments in writing, such as contracts for the sale of realty. Based on the rationale expressed in *Haas*, we hold that KFK is entitled to 5% statutory interest on the $850,000 owed it, running from September 16, 1974 (the last date which it had to purchase the stock under the contract) to the date of final judgment in this case.

Finally, we note that the judgment of the trial court does not properly take into account the relationship between the parties resulting from the findings on the merits.

KFK's claim was solely for specific performance and not for damages. As the successful litigant in such a case, it was entitled to the full, contractual sales price, plus interest. However, in its turn, it must balance the transaction by transferring its interest in the ACH stock to that defendant who actually purchases it.

Similarly, as we have noted above, AFC was a separate party to this action and was entitled, without question, to judgment upon the $500,000 defaulted note executed by KFK. It is indisputable that the rights of AFC to recovery under the note are independent of any obligations AFC might have to KFK as a guarantor and not a surety under the contract, and we hold that it was improper for the court to use the sum due on the note as a setoff for ACH's primary obligations to KFK. We note parenthetically here that AFC never claimed the 10% per annum interest which the terms of the note call for after maturity. In fact, in this proceeding AFC specifically and consistently only sought the payment of the principal, thus waiving any claim to interest under the note.

In conclusion, we find that the relief mandated by the judgment order entered by the trial court is erroneous under the facts of this case and must be reversed. Therefore, although we have partially affirmed the trial court

on the merits, we must reverse and remand this cause for the entry of a new order, requiring:

A. ACH to pay KFK $850,000, plus 5% per annum interest from September 16, 1974 to the date of judgment.

B. AFC to hold itself ready to assume the liability of ACH upon a showing that ACH cannot pay the sum required by A.

C. KFK to pay to AFC the sum of $500,000 in principal on the defaulted note.

D. AFC to release to KFK the 46,380 shares of ACH stock which it was holding as collateral on the note.

E. KFK to transfer the 46,380 shares of ACH stock to whichever of the defendants pays the amount called for in A.

For the reasons set forth above, this case is affirmed in part, reversed in part and remanded with directions.

AFFIRMED IN PART; REVERSED IN PART and REMANDED WITH DIRECTIONS.

LINDBERG and NASH, JJ. concur.

APPENDIX B

ILLINOIS SUPREME COURT
CLELL L. WOODS, CLERK
Supreme Court Building
Springfield, Illinois 62706
(217) 782-2035

October 1, 1979

Mr. Theodore A. Shapero
Attorney at Law
Rudnick & Wolfe
30 North LaSalle St.
Chicago, IL 60602

No. 52170—KFK Corporation, respondent, vs. American Continental Homes, Inc., et al., petitioners. Leave to appeal, Appellate Court, Second District.

The Supreme Court today denied the petition for leave to appeal in the above entitled cause. Mr. Justice Moran took no part.

Very truly yours,

/s/ Clell L. Woods
Clerk of the Supreme Court

APPENDIX C

***Rule 144. Persons Deemed Not to be Engaged in a Distribution and Therefore Not Underwriters.**

Preliminary Note

Rule 144 is designed to implement the fundamental purposes of the Act, as expressed in its preamble, "To provide full and fair disclosure of the character of the securities sold in interstate commerce and through the mails, and to prevent fraud in the sale thereof . . ." The rule is designed to prohibit the creation of public markets in securities of issuers concerning which adequate current information is not available to the public. At the same time, where adequate current information concerning the issuer is available to the public, the rule permits the public sale in ordinary trading transactions of limited amounts of securities owned by persons controlling, controlled by or under common control with the issuer and by persons who have acquired restricted securities of the issuer.

Certain basic principles are essential to an understanding of the requirement of registration in the Act:

1. If any person utilizes the jurisdictional means to sell any non-exempt security to any other person, the security must be registered unless a statutory exemption can be found for the transaction.

2. In addition to the exemptions found in Section 3, four exemptions applicable to transactions in securities are contained in Section 4. Three of these Section 4 exemptions are clearly not available to anyone acting as an "underwriter" of securities. (The fourth, found in Section 4(4), is available only to those who act as brokers under certain limited circumstances.) An understanding of the term "underwriter" is therefore important to anyone who wishes to determine whether or not an exemption from registration is available for his sale of securities.

The term underwriter is broadly defined in Section 2(11) of the Act to mean any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking. The interpretation of this definition has traditionally focused on the words "with a view to" in the phrase "purchased from an issuer with a view to . . . . distribution." Thus, an investment banking firm which arranges with an issuer for the public sale of its securities is clearly an "underwriter" under that Section. Individual investors who are not professionals in the securities business may also be "underwriters" within the meaning of that term as used in the Act if they act as links in a chain of transactions through which securities move from an issuer to the public. Since it is difficult to ascertain the mental state of the purchaser at the time of his acquisition, subsequent acts and circumstances have been considered to determine whether such person took with a view to distribution at the time of his acquisition. Emphasis has been placed on factors such as the length of time the person has held the securities and whether there has been an unforeseeable change in circumstances of the holder. Experience has shown, however, that reliance upon such factors as the above has not assured adequate protection of investors through the maintenance of informed trading markets and has led to uncertainty in the application of the registration provisions of the Act.

It should be noted that the statutory language of Section 2(11) is in the disjunctive. Thus, it is insufficient to conclude that a person is not an underwriter solely because he did not purchase securities from an issuer with a view to their distribution. It must also be established that the person is not offering or selling for an issuer in connection with the distribution of the securities, does not participate or have a direct or indirect participation in any such undertaking, and does not participate or have a participation in the direct or indirect underwriting of such an undertaking.

In determining when a person is deemed not to be engaged in a distribution several factors must be considered.

First, the purpose and underlying policy of the Act to protect investors requires that there be adequate current information concerning the issuer, whether the resales of securities by persons result in a distribution or are effected in trading transactions. Accordingly, the availability of the rule is conditioned on the existence of adequate current public information.

Secondly, a holding period prior to resale is essential, among other reasons, to assure that those persons who buy under a claim of a Section 4(2) exemption have assumed the economic risks of investment, and therefore are not acting as conduits for sale to the public of unregistered securities, directly or indirectly, on behalf of an issuer. It should be noted that there is nothing in Section 2(11) which places a time limit on a person's status as an underwriter. The public has the same need for protection afforded by registration whether the securities are distributed shortly after their purchase or after a considerable length of time.

A third factor, which must be considered in determining what is deemed not to constitute a "distribution," is the impact of the particular transaction or transactions on the trading markets. Section 4(1) was intended to exempt only routine trading transactions between individual investors with respect to securities already issued and not to exempt distributions by issuers or acts of other individuals who engage in steps necessary to such distributions. Therefore, a person reselling securities under Section 4(1) of the Act must sell the securities in such limited quantities and in such a manner as not to disrupt the trading markets. The larger the amount of securities involved, the more likely it is that such resales may involve methods of offering and amounts of compensation usually associated with a distribution rather than routine trading transactions. Thus, solicitation of buy orders or the payment of extra compensation are not permitted by the rule.

In summary, if the sale in question is made in accordance with *all* of the provisions of the rule, as set forth below, any person who sells restricted securities shall be deemed not to be engaged in a distribution of such securities and therefore not an underwriter thereof. The rule also provides that any person who sells restricted or other securities on behalf of a person in a control relationship with the issuer shall be deemed not to be engaged in a distribution of such securities and therefore not to be an underwriter thereof, if the sale is made in accordance with *all* the conditions of the rule.

RULE 144

(a) Definitions. The following definitions shall apply for the purposes of this rule.

(1) An "affiliate" of an issuer is a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, such issuer.

(2) The term "person" when used with reference to a person for whose account securities are to be sold in reliance upon this rule includes, in addition to such person, all of the following persons:

(A) Any relative or spouse of such person, or any relative of such spouse, any one of whom has the same home as such person;

(B) Any trust or estate in which such person or any of the persons specified in (A) collectively own ten percent or more of the total beneficial interest or of which any of such persons serve as trustee, executor or in any other capacity; and

(C) Any corporation or other organization (other than the issuer) in which such person or any of the persons specified in (A) are the beneficial owners collectively of ten percent or more of any class of equity securities or ten percent or more of the equity interest.

(3) The term "restricted securities" means securities acquired directly or indirectly from the issuer thereof, or from an affiliate of such issuer, in a transaction or chain of transactions not involving any public offering or from the issuer in a transaction in reliance on Rule 240 under the Act or which were issued by an issuer in a transaction in reliance on Rule 240 and were acquired in a transaction or chain of transactions not involving any public offering.

(b) Conditions to be Met. Any affiliate or other person who sells restricted securities of an issuer for his own account, or any person who sells restricted or any other securities for the account of an affiliate of the issuer of such securities, shall be deemed not to be engaged in a distribution of such securities and therefore not to be an underwriter thereof within the meaning of Section 2(11) of the Act if all of the conditions of this rule are met.

(c) Current Public Information. There shall be available adequate current public information with respect to the issuer of the securities. Such information shall be deemed to be available only if either of the following conditions is met:

(1) *Filing of Reports.* The issuer has securities registered pursuant to Section 12 of the Securities Exchange Act of 1934, has been subject to the reporting requirements of Section 13 of that Act for a period of at least 90 days immediately preceding the sale of the securities and has filed all the reports required to be filed thereunder during the 12 months preceding such sale (or for such shorter period that the issuer was required to file such reports); or has securities registered pursuant to the Securities Act of 1933, has been subject to the reporting requirements of Section 15(d) of the Securities Exchange Act of 1934 for a period of at least 90 days immediately preceding the sale of the securities and has filed all the reports required to be filed thereunder during the 12 months preceding such sale (or for such shorter period that the issuer was required to file such reports). The person for whose account the securities are to be sold shall be entitled to rely upon a statement in whichever is the most recent report, quarterly or annual, required to be filed and filed by the issuer that such issuer has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the issuer was required to file such reports) and has been subject to such filing requirements for the past 90 days, unless he knows or has reason to believe that the issuer has not complied with such requirements. Such person shall also be entitled to rely upon a written statement from the issuer that it has complied with such reporting requirements unless he knows or has reason to believe that the issuer has not complied with such.

(2) *Other Public Information.* If the issuer is not subject to Section 13 or 15(d) of the Securities Exchange Act of 1934, there is publicly available the information concerning the issuer specified in clauses (1) to (14), inclusive and clause (16) of paragraph (a)(4) of Rule 15c2-11 under that Act or, if the issuer is an insurance company, the information specified in Section 12(g)(2)(G)(i) of that Act.

(d) Holding Period for Restricted Securities. If the securities sold are restricted securities, the following provisions apply:

(1) *General Rule.* The person for whose account the securities are sold shall have been the beneficial owner of the securities for a period of at least two years prior to the sale and, if the securities were purchased, the full purchase price or other consideration shall have been paid or given at least two years prior to the sale.

(2) *Promissory Notes, Other Obligations or Installment Contracts.* Giving the person from whom the securities were purchased a promissory note or other obligation to pay the purchase price, or entering into an installment purchase contract with such person, shall not be deemed full payment of the purchase price unless the promissory note, obligation or contract—

(A) provides for full recourse against the purchaser of the securities;

(B) is secured by collateral, other than the securities purchased, having a fair market value at least equal to the purchase price of the securities purchased; and

(C) shall have been discharged by payment in full prior to the sale of the securities.

(3) *Short Sales. Puts or Other Options to Sell Securities.* In computing the two-year holding period the following periods shall be excluded:

(A) If the securities sold are equity securities, there shall be excluded any period during which the person for whose account they are sold had a short position in, or any put or other option to dispose of, any equity securities of the same class or any securities convertible into securities of such class; and

(B) If the securities sold are nonconvertible debt securities, there shall be excluded any period during which the person for whose account they are sold had a short position in, or any put or other option to dispose of, any nonconvertible debt securities of the same issuer.

(4) *Determination of Holding Period.* The following provisions shall apply for the purpose of determining the period securities have been held:

(A) *Stock Dividends, Splits and Recapitalizations.* Securities acquired from the issuer as a dividend or pursuant to a stock split, reverse split or recapitalization shall be deemed to have been acquired at the same time as the securities on which the dividend or, if more than one, the initial dividend was paid, the securities involved in the split or reverse split, or the securities surrendered in connection with the recapitalization;

(B) *Conversions.* If the securities sold were acquired from the issuer for a consideration consisting solely of other securities of the same issuer surrendered for conversion, the securities so acquired shall be deemed to have been acquired at the same time as the securities surrendered for conversion;

(C) *Contingent Issuance of Securities.* Securities acquired as a contingent payment of the purchase price of an equity interest in a business, or the assets of a business, sold to the issuer or an affiliate of the issuer shall be deemed to have been acquired at the time of such sale if the issuer or

affiliate was then committed to issue the securities subject only to conditions other than the payment of further consideration for such securities. An agreement entered into in connection with any such purchase to remain in the employment of, or not to compete with, the issuer or affiliate or the rendering of services pursuant to such agreement shall not be deemed to be the payment of further consideration for such securities.

(D) *Pledged Securities.* Securities which are bona fide pledged by any person other than the issuer when sold by the pledgee, or by a purchaser, after a default in the obligation secured by the pledge, shall be deemed to have been acquired when they were acquired by the pledgor, except that if the securities were pledged without recourse they shall be deemed to have been acquired by the pledgee at the time of the pledge or by the purchaser at the time of purchase.

Note. Securities sold by the pledgee shall be aggregated with those sold by the pledgor, as provided in paragraph (c)(3)(B) below.

(E) *Gifts of Securities.* Securities acquired from any person, other than the issuer, by gift shall be deemed to have been acquired by the donee when they were acquired by the donor;

Note. Securities sold by the donee shall be aggregated with those sold by the donor, as provided in paragraph (e)(3)(C) below.

(F) *Trusts.* Securities acquired from the settlor of a trust by the trust or acquired from the trust by the beneficiaries thereof shall be deemed to have been acquired when they were acquired by the settlor;

Note. Securities sold by the trust shall be aggregated with those sold by the settlor of the trust, as provided in paragraph (e)(3)(D) below.

(G) *Estates.* Securities held by the estate of a deceased person or acquired from such an estate by the beneficiaries thereof shall be deemed to have been acquired when they

were acquired by the deceased person, except that no holding period is required if the estate is not an affiliate of the issuer or if the securities are sold by a beneficiary of the estate who is not such an affiliate.

Notes. 1. Securities sold by the estate shall be aggregated with those sold by the deceased person, as provided in paragraph (e)(3)(E) below, if the estate is an affiliate of the issuer.

2. While there is no holding period or amount limitation for estates and beneficiaries thereof which are not affiliates of the issuer, paragraphs (c), (f), (g), (h) and (i) of the rule apply to securities sold by such persons in reliance upon the rule.

(e) Limitation on Amount of Securities Sold. Except as hereinafter provided, the amount of securities which may be sold in reliance upon this rule shall be determined as follows:

(1) *Sales by Affiliates.* If restricted or other securities are sold for the account of an affiliate of the issuer, the amount of securities sold, together with all sales of restricted and other securities of the same class for the account of such person within the preceding three months, shall not exceed the greater of (i) one percent of the shares or other units of the class outstanding as shown by the most recent report or statement published by the issuer, or (ii) the average weekly reported volume of trading in such securities reported on all national securities exchanges and/or reported through the automated quotation system of a registered securities association during the four calendar weeks preceding the filing of notice required by paragraph (h), or if no such notice is required, the date of receipt of the order to execute the transaction by the broker or the date of execution of the transaction directly with a market maker, or (iii) the average weekly volume of trading in such securities reported through the consolidated transaction reporting system contemplated by Rule 17a-15 under the Securities Exchange Act of 1934 during the four-week period specified in subdivision (ii) of this subparagraph.

(2) *Sales by persons other than affiliates.* The amount of restricted securities sold for the account of any person other than an affiliate of the issuer, together with all other sales of restricted securities of the same class for the account of such person within the preceding three months, shall not exceed the amount specified in paragraphs (e) (1)(i), (1)(ii), or (1)(iii) of this section, whichever is applicable.

(3) *Determination of amount.* For the purpose of determining the amont of securities specified in paragraphs (e)(1) and (2) of this rule, the following provisions shall apply:

(A) Where both convertible securities and securities of the class into which they are convertible are sold, the amount of convertible securities sold shall be deemed to be the amount of securities of the class into which they are convertible for the purpose of determining the aggregate amount of securities of both classes sold;

(B) The amount of securities sold for the account of a pledgee thereof, or for the account of a purchaser of the pledged securities, during any period of three months within two years after a default in the obligation secured by the pledge, and the amount of securities sold during the same three-month period for the account of the pledgor shall not exceed, in the aggregate, the amount specified in subparagraph (1) or (2) of this paragraph, whichever is applicable;

(C) The amount of securities sold for the account of a donee thereof during any period of three months within two years after the donation, and the amount of securities sold during the same three-month period for the account of the donor, shall not exceed, in the aggregate, the amount specified in subparagraph (1) or (2) of this paragraph, whichever is applicable;

(D) Where securities were acquired by a trust from the settlor of the trust, the amount of such securities sold for the account of the trust during any period of three months within two years after the acquisition of the securities by the trust, and the amount of securities sold during the same three-month period for the account of the settlor, shall not exceed,

in the aggregate, the amount specified in subparagraph (1) or (2) of this paragraph, whichever is applicable;

(E) The amount of securities sold for the account of the estate of a deceased person, or for the account of a beneficiary of such estate, during any period of three months and the amount of securities sold during the same period for the account of the deceased person prior to his death shall not exceed, in the aggregate, the amount specified in subparagraph (1) or (2) of this paragraph, whichever is applicable; *Provided*, That no limitation on amount shall apply if the estate or beneficiary thereof is not an affiliate of the issuer;

(F) When two or other persons agree to act in concert for the purpose of selling securities of an issuer, all securities of the same class sold for the account of all such persons during any period of three months shall be aggregated for the purpose of determining the limitation on the amount of securities sold;

(f) Manner of sale. The securities shall be sold in "brokers' transactions" within the meaning of Section 4(4) of the Act or in transactions directly with a "market maker," as that term is defined in Section 3(a)(38) of the Securities Exchange Act of 1934, and the person selling the securities shall not (1) solicit or arrange for the solicitation of orders to buy the securities in anticipation of or in connection with such transactions, or (2) make any payment in connection with the offer or sale of the securities to any person other than the broker who executes the order to sell the securities. The requirements of this paragraph, however, shall not apply to securities sold for the account of the estate of a deceased person or for the account of a beneficiary of such estate, provided the estate or beneficiary thereof is not an affiliate of the issuer.

(g) Brokers' Transactions. The term "brokers' transactions" in Section 4(4) of the Act shall for the purposes of this rule be deemed to include transactions by a broker in which such broker—

(1) does no more than execute the order or orders to sell the securities as agent for the person for whose account the securities are sold; and receives no more than the usual and customary broker's commission;

(2) neither solicits nor arranges for the solicitation of customers' orders to buy the securities in anticipation of or in connection with the transactions; provided, that the foregoing shall not preclude (i) inquiries by the broker *of* other brokers or dealers who have indicated an interest in the securities within the preceding 60 days, (ii) inquiries by the broker of his customers who have indicated an unsolicited bona fide interest in the securities within the preceding 10 business days; or (iii) the publication by the broker of bid and ask quotations for the security in an inter-dealer quotation system provided that such quotations are incident to the maintenance of a bona fide inter-dealer market for the security for the broker's own account and that the broker has published bona fide bid and ask quotations for the security in an inter-dealer quotation system on each of at least twelve days within the preceding thirty calendar days with no more than four business days in succession without such two-way quotations;

Note to Subparagraph g(2)(ii): The broker should obtain and retain in his files written evidence of indications of bona fide unsolicited interest by his customers in the securities at the time such indications are received.

(3) after reasonable inquiry is not aware of circumstances indicating that the person for whose account the securities are sold is an underwriter with respect to the securities or that the transaction is a part of a distribution of securities of the issuer. Without limiting the foregoing, the broker shall be deemed to be aware of any facts or statements contained in the notice required by paragraph (h) below.

Notes. 1. The broker, for his own protection, should obtain and retain in his files a copy of the notice required by paragraph (h).

2. The reasonable inquiry required by paragraph (g)(3) of this section should include, but not necessarily be limited to, inquiry as to the following matters:

a. The length of time the securities have been held by the person for whose account they are to be sold. If practicable, the inquiry should include physical inspection of the securities;

b. The nature of the transaction in which the securities were acquired by such person;

c. The amount of securities of the same class sold during the past three months by all persons whose sales are required to be taken into consideration pursuant to paragraph (e) of this section;

d. Whether such person intends to sell additional securities of the same class through any other means;

e. Whether such person has solicited or made any arrangement for the solicitation of buy orders in connection with the proposed sale of securities;

f. Whether such person has made any payment to any other person in connection with the proposed sale of the securities; and

g. The number of shares or other units of the class outstanding, or the relevant trading volume.

(h) Notice of Proposed Sale. If the amount of securities to be sold in reliance upon the rule during any period of three months exceeds 500 shares or other units or has an aggregate sale price in excess of $10,000, three copies of a notice on Form 144 shall be filed with the Commission at its principal office in Washington, D.C.; and if such securities are admitted to trading on any national securities exchange, one copy of such notice shall also be transmitted to the principal exchange on which such securities are so admitted. The Form 144 shall be signed by the person for whose account the securities are to be sold and shall be transmit-

ted for filing concurrently with either the placing with a broker of an order to execute a sale of securities in reliance upon this rule or the execution directly with a market maker of such a sale. Neither the filing of such notice nor the failure of the Commission to comment thereon shall be deemed to preclude the Commission from taking any action it deems necessary or appropriate with respect to the sale of the securities referred to in such notice.

(i) Bona Fide Intention to Sell. The person filing the notice required by paragraph (h) shall have a bona fide intention to sell the securities referred to therein within a reasonable time after the filing of such notice.

Supreme Court, U.S.
FILED
JAN 31 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1024

AMERICAN CONTINENTAL HOMES, INC. and AMERICAN FINANCIAL CORPORATION,

Petitioners,

vs.

KFK CORPORATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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IN THE

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Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

OPINION BELOW

The opinion of the Appellate Court of Illinois for the Second District is reported at 71 Ill.App.3d 304, 389 N.E. 2d 232 (1979). (See appellants' brief, appendix 1a-14a.) One of the issues the Appellate Court ruled on was whether KFK Corporation (KFK) complied with the provision in the contract relative to using its "reasonable efforts" to dispose of some or all of American Continental Homes, Inc. (ACH) stock. The question decided was not interpretation of Rule 144 but rather the construction of the contractual terms between the parties.

JURISDICTION

No jurisdiction lies in the Supreme Court for the issue decided by the Appellate Court was interpretation of a provision in a certain contract and not the interpretation of any part of Rule 144 of the Securities and Exchange Commission.

STATEMENT OF THE CASE

A Complaint for Specific Performance was filed by KFK against ACH. The defendants filed an amendment to its answer (see appendix 1a) which affirmatively alleged that KFK did not comply with a condition precedent to recovery on said contract by failing to use all reasonable efforts to sell certain shares of ACH and for that reason defendants had no duty to purchase said shares. After hearing of all the evidence, the Trial Judge found for the plaintiff and against the defendant on this issue. The Appellate Court affirmed the Trial Court.

The facts established that on June 8, 1972, a contract was entered into by KFK and ACH providing for the sale and purchase of a subdivision. American Financial Corporation (AFC) executed said contract as a guarantor of the acts of ACH under the terms of said contract. Said contract provided that, as part of the consideration, KFK was to receive 46,380 shares of ACH stock, which it had the right to keep or dispose of within a period of time and, if unable to dispose of said shares "utilizing all reasonable efforts", could tender said shares for $850,000.

The Trial Judge found that, under the facts presented at trial, KFK had "utilized all reasonable efforts" to dispose of said stock. ACH and AFC appealed to the Appellate Court, specifically alleging as error this finding of the Trial Court. The Appellate Court addressed this issue (see page 8a of petitioners' brief). The Appellate Court referred to Rule 144; found that there was a difference between holding registered and unregistered stock; and found that the facts supported finding that KFK "utilized all reasonable efforts" to dispose of its ACH stock and thus fulfilled that condition precedent. The petitioners have attempted to cite a portion of the reasoning dealing with Rule 144 in hopes of obtaining jurisdiction to this Court. The Appellate Court did not interpret the Securities Act of 1933 (15 U.S.C. §77d, *et seq.*) or Rule 144 of the Securities and Exchange Commission.

CONCLUSION

The Appellate Court did not rule on the interpretation of a Federal statute but only a provision of a contract between KFK and ACH. Respondent-plaintiff KFK respectfully prays that the petition for certiorari be denied.

Respectfully submitted,

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APPENDIX

AMENDMENT TO ANSWER

(R. C147)

Now come American Continental Homes, Inc., and American Financial Corporation, by George W. Hamman, their attorney, and amend their Answer heretofore filed as follows:

Defendants add the following to their Answer to paragraph 10:

10. They deny the allegations of paragraph 10. Further answering, defendants state that a condition precedent to their obligation to repurchase the shares was that ". . . KFK shall undertake, utilizing all reasonable efforts, to dispose of so many of the ACH common shares as may be sold by it in conformity with the provisions of the Securities Act of 1933 and for the market price of such shares then prevailing . . .". KFK failed to make all reasonable efforts to sell said shares and accordingly defendants have no duty to purchase said shares.

May 12, 1976

JUDGMENT ORDER

(R. C203-C204)

This cause coming on for decision on the issues formulated by the pleadings, on which issues a hearing was held, and the Court having seen and heard the witnesses for the plaintiff and the defendants and the oral arguments of their respective counsel, and having examined the documents introduced into evidence, and being fully advised in the premises,

FINDS:

A. That the material issues relative to the Complaint for Specific Performance are with the plaintiff, K.F.K. Corporation, and against the defendants, American Continental Homes, Inc. and American Financial Corporation.

B. That the material issues relative to the Counterclaim filed by the defendants, American Continental Homes, Inc. and American Financial Corporation, are with the plaintiff, K.F.K. Corporation, and against the said defendants.

It Is Hereby Ordered, Adjudged And Decreed by the Court that a judgment be and the same is hereby entered in favor of the plaintiff, K.F.K. Corporation, and against the defendants, American Continental Homes, Inc. and American Financial Corporation, and each of them, jointly and severally, in the amount of Three Hundred Fifty Thousand Dollars ($350,000.00), together with plaintiff's costs of suit.

It Is Further Ordered, Adjudged And Decreed that the Counterclaim filed by the defendants, American Continental Homes, Inc. and American Financial Corporation, and against the plaintiff, K.F.K. Corporation, be and the same is hereby dismissed with prejudice.

It Is Further Ordered that a Writ of Execution issue on said Judgment.

Enter:

/s/ Bruce R. Fawell

Judge

Dated: April 14, 1977